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No. 82-940

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,
Petitioner,

vs.

KING & SPALDING,
Respondent.

On Certiorari To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit correctly determined that a law firm partnership's decisions regarding its partners are not subject to review under Title VII of the Civil Rights Act of 1964.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement of the Case	1
Reasons for Denying The Writ	2
Conclusion	7

TABLE OF AUTHORITIES

Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977)	2
F.E.C. v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981)	5
Lucido v. Cravath, Swaine & Moore, 425 F.Supp. 123 (S.D.N.Y. 1977)	3,6
Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000e-2	2,3,4,5,6

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STATEMENT OF THE CASE

The Eleventh Circuit's opinion, which is reproduced at pages A-2 through A-5 of Appendix A to the Petition, contains a concise statement of the relevant facts and the proceedings in the District Court, 678 F.2d at 1024-26. Respondent respectfully

submits that this statement is more accurate, dispassionate, and balanced than Petitioner's statement.[1]

REASONS FOR DENYING THE WRIT

Stripped of its appeals to passion and demagoguery, the Petition requests that this Court address a simple question of statutory construction of Title VII, despite the absence of a conflict in the Circuit Courts and despite the fact that, in the eighteen year history of Title VII litigation, the question has arisen only twice. Respondent respectfully submits that the Petition should be denied for the following reasons.

First, there is no conflict among the Circuit Courts as to whether Title VII applies to a partnership's determinations regarding its partners. *The decision below is the only decision by a Circuit Court to address this issue.* Moreover, the only other Circuit Court to consider whether partners are "employees" of a partnership for the purpose of Title VII, the central tenet of Petitioner's argument, has concluded that they are not. In *Burke* v. *Friedman,* 556 F.2d 867 (7th Cir. 1977), the Seventh Circuit explained its conclusion that the partners of an accounting firm could not be considered "employees" of the firm as follows:

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[1] The highly misleading nature of Petitioner's summary of the proceedings below is reflected in Petitioner's statement that "[t]he district court imposed a stay on merits discovery" and "restricted" discovery to the threshold jurisdictional issue. Petitioner, at 5. Remarkably, Petitioner omits the fact that *the stay on merits discovery was initially suggested by her counsel* in a letter to the District Court, a fact noted by the Eleventh Circuit. 678 F.2d at 1025, n.4 (App. A-4). Indeed, it was only after this suggestion from Petitioner's counsel's that, as the Eleventh Circuit explained, "*the parties and the District Court mutually agreed to limit initial discovery* to information needed to determine the jurisdictional issue of Title VII." 678 F.2d at 1025 (App. A-5) (emphasis added).

> "[S]ection 6 of the Uniform Partnership Act defines a partnership as 'an association of two or more persons to carry on a business for profit.' *Partners manage and control the business and share in the profits and losses.... In light of the foregoing, we do not see how partners can be regarded as employees rather than as employers who own and manage the operations of the business.*"
>
> 556 F.2d at 869
> (emphasis added).

In its decision in this case, the Eleventh Circuit expressly endorsed this reasoning of the Seventh Circuit. 678 F.2d at 1027 (App. A-10).

Second, despite Petitioner's allusions to historical discrimination in the legal profession, the virtual absence of litigation of this issue under Title VII establishes that the question of whether the statute applies to partnership determinations is not a matter of great moment to persons other than the parties to this suit. Title VII has been the law of the land for almost two decades, and the Act has generated an explosion of litigation. Nonetheless, the question of whether partnership determinations are subject to review under Title VII has, to the best of Respondent's knowledge, arisen in only one other case, *Lucido v. Cravath, Swaine & Moore*, 425 F.Supp. 123 (S.D.N.Y. 1977). The *Lucido* case has subsequently been dismissed, and Respondent knows of no case pending in either the District Courts or the Circuit Courts in which this issue has been raised. Given these facts, Respondent respectfully submits that the historical vignettes and statistics fashioned by Petitioner have no bearing on the question of whether the Court should issue a writ of certiorari in this case.

Third, the Eleventh Circuit's decision correctly resolved the issue of whether Title VII applies to the partnership determina-

tions of Respondent. The Eleventh Circuit addressed virtually all of the substantive arguments raised in the Petition and Respondent will not attempt to summarize the cogent reasoning of Circuit Judge Fay's opinion. The conclusion of the Eleventh Circuit that the issue raised by Petitioner is ultimately "a single narrow issue" of statutory construction, however, should be emphasized. 678 F.2d at 1026 (App. A-5). While this Court has often stated that Title VII should not be narrowly construed, the Court has never suggested that the boundaries of the statute, where clear, should be ignored. Title VII was enacted to redress *employment* discrimination. The statute outlaws discrimination with respect to "compensation, terms, conditions, or privileges *of employment,*" and actions which would "adversely affect his status *as an employee.*" 42 U.S.C. §2000e-2 (emphasis added). The statute was not designed to protect or define the relationships among partners who are owners *and thus employers.*[2] Indeed, Circuit Judge Tjoflat, in his dissent, recognizes that "Title VII would not apply to the discrete decision whether to take on a new partner...", 678 F.2d at 1030 (App. A-16), thereby rejecting the prime thesis of plaintiff's argument.

Faced with statutory language which cannot be stretched to cover her claim, Petitioner urges the Court to endorse a pure legal fiction: That, despite Respondent's being treated as a true partnership and the partners as owners-employers of the firm for all other purposes of federal and state law, for purposes of Title VII Respondent should be treated as a corporation and the partners as middle-management employees. Neither the District

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[2] In her Charge of Discrimination filed with the E.E.O.C., Petitioner recognized that partners are "employers" rather than "employees" under Title VII. Petitioner individually named each of the partners as a respondent to the Charge and alleged that "each of [the partners] is my employer." (R. 14).

Court nor the Eleventh Circuit found any basis for accepting this bold invitation for judicial legislation. Indeed, the Eleventh Circuit expressly rejected Petitioner's contention that, through its written partnership agreement and management structure, Respondent "has unbeknownst to itself incorporated its partnership." 678 F.2d at 1026 (App. A-7).[1]

While the Eleventh Circuit recognized the "alluring quality" of Petitioner's arguments, 678 F.2d at 1026 (App. A-6), after carefully analyzing the language, legislative history, and case law, the Court held that "[t]he partnership is the appellant's employer; the partners own the partnership; they are not its 'employees' under Title VII." (App. A-10). The conclusion of the Eleventh Circuit in this regard is particularly enlightening:

> "We find a clear distinction between employees of a corporation and partners of a law firm. In making this distinction, we do not presume to exalt form over substance. In

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[1] Petitioner also argues that the Court should consider partners to be "employees" because the E.E.O.C. supports this view. (Petition, at 21). This is not, however, a case where the E.E.O.C. has exercised its authority to promulgate a regulation after study and public comment, but instead is a case where the E.E.O.C. has expressed a view unencumbered by investigation or facts. The E.E.O.C. *specifically declined* to review both Petitioner's Charge of Discrimination and subsequent Amended Charge and failed to exercise its statutory duty to conciliate the claims of Petitioner. The *amicus curiae* brief filed in the Court below was therefore filed without access to either an investigative file or the record in this case. (Petition, at 5 n.3). This Court has recently explained that "the thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling." *F.E.C. v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). In this instance, Respondent submits that the E.E.O.C.'s view expressed in its brief below is "inconsistent with the statutory mandate" of Title VII and was therefore properly rejected by the Eleventh Circuit. *Id.* at 52.

this instance, however, the form *is* the substance, and we are unwilling to dictate partnership decisions under the guise of employee promotions protected by Title VII. The very essence of a partnership is the voluntary joinder of all partners with each other."

678 F.2d at 1028
(App. A-10).

Finally, the Eleventh Circuit's decision recognizes that the question of whether Title VII governs *admission* to partnership cannot reasonably be isolated from the broader question of "whether Title VII applies to a law firm's decisions regarding its partners." 678 F.2d at 1026 (App. A-5). Certainly Petitioner's argument that partners should be considered "employees" of the firm would lead inexorably to the conclusion that Title VII governs all aspects of the partners' relations among themselves. The Eleventh Circuit found the legislative history devoid of any indication that Congress intended such a result. Indeed, even the *Lucido* Court was reluctant to embrace so broad a reading of Title VII. 425 F.Supp. at 128. Respondent submits that, in the absence of a clear expression of Congressional intent to regulate the relationship among partners, Petitioner's argument must fail.

In summary, Petitioner asks this Court to consider a question of statutory construction which was carefully analyzed and decided by the lower courts. That this issue is not a matter of great moment is reflected by the fact that the position espoused by Petitioner has been asserted in only one other case and has produced no conflict in the decisions of the Circuit Courts. Petitioner's effort to imbue the case with an aura of historical significance which it cannot support should not obscure these facts.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

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